

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

JULY 25, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 95-0043-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

EUGENE I. SMITH,

Plaintiff-Appellant,

v.

M & I INVESTMENT MANAGEMENT CORP.,

Defendant-Respondent,

SHAWN J. FOLEY,

Defendant.

APPEAL from a judgment of the circuit court for Milwaukee County: GEORGE A. BURNS, JR., Judge. *Affirmed.*

Before Wedemeyer, P.J., Sullivan and Fine, JJ.

PER CURIAM. Eugene Smith appeals from judgment in favor of M & I Investment Management Corporation (M & I). Pursuant to this court's order dated February 14, 1995, this case was submitted to the court on the

expedited appeals calendar. *See* RULE 809.17, STATS. The issues are: (1) whether the trial court properly concluded that Smith was not entitled to a jury trial; and (2) whether the trial court properly excluded as hearsay the testimony of Attorney Jill Gilbert. We conclude that Smith was not entitled to a jury trial but that the trial court erred in excluding Gilbert's testimony. Because the error was harmless, however, we affirm the judgment.

Smith was co-trustee and beneficiary of a trust created by his deceased aunt, Viola Chapin. M & I was also co-trustee. At the time the dispute at issue here arose, the value of the trust was nearly \$6,000,000. The sole asset of the trust was shares of stock in Franklin Resources, Inc. In late April 1992, M & I sold 100,000 shares of the stock in order to raise cash for the estate taxes and to diversify the trust's portfolio. After the sale, Smith brought this action against M & I, contending that M & I acted improperly in selling the stock without his approval, thereby breaching its fiduciary duty to Smith as beneficiary and co-trustee.

During a trial to the bench, Smith testified that he came to an agreement in principle with M & I to sell some shares of the stock at a meeting on April 13, 1992, but that he expected to be consulted with for his approval before the stock was actually sold and that he wouldn't consider selling it below 26 1/8. M & I employees, on the other hand, testified at trial that Smith gave blanket approval to sell the stock after M & I received additional shares of the stock resulting from a two-for-one stock split, but that Smith never discussed the price at which the shares should be sold.

After considering the testimony and other evidence, the trial court ruled in M & I's favor. The trial court found that Smith did not place any limitations on the sale of the stock and did not set a minimum selling price for the stock until April 29, by which time 100,000 shares had been sold.

Smith first argues that he was entitled to a jury trial. We disagree. The right to a trial by jury does not extend to cases raising equitable claims. *Little v. Roundy's, Inc.*, 152 Wis.2d 715, 722, 449 N.W.2d 78, 82 (Ct. App. 1989). Smith argued that M & I breached its fiduciary duty to him as co-trustee and beneficiary of the trust. This is a claim sounding in equity. *See Banking Comm'n v. Smith*, 242 Wis. 574, 579, 8 N.W.2d 535, 537 (1943) (courts of equity

have exclusive jurisdiction in cases involving trusts and the conduct of those appointed to execute them). Therefore, Smith was not entitled to a jury trial.

Smith next argues that the trial court erred in excluding the testimony of Smith's personal attorney, Jill Gilbert. In an offer of proof, Smith stated that Gilbert would testify about statements he made to her after the April 13 meeting. Smith contended that Gilbert would testify that he told her that he expected to be consulted before the stock was sold. Smith argued that this testimony would corroborate his version of the events at the April 13 meeting. The trial court excluded the testimony because it concluded that it was hearsay, not subject to any exceptions to the hearsay rule.

Generally, the admissibility of evidence is submitted to the sound discretion of the trial court, and its rulings will not be overturned unless there is an erroneous exercise of discretion. *Vonch v. American Standard Ins. Co.*, 151 Wis.2d 138, 150, 442 N.W.2d 598, 602 (Ct. App. 1989). If there was a "reasoned and reasonable" rationale for the trial court's decision, we will uphold it on appeal. *Hartung v. Hartung*, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20 (1981).

A statement is not hearsay if the declarant testifies at trial and is subject to cross-examination concerning the statement, the statement is consistent with the declarant's testimony, and the statement is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. Section 908.01(4)(a)2, STATS.

The rationale underlying the prior consistent statement exception to the hearsay rule is that if a witness can demonstrate that she had related a version of the events consistent with her courtroom testimony before the recent fabrication, improper influence or motive arose, the existence of a prior consistent statement rebuts the charge of recent fabrication or improper influence or motive.

State v. Peters, 166 Wis.2d 168, 177, 479 N.W.2d 198, 201 (Ct. App. 1991).

We conclude that the trial court erred as a matter of law in excluding the evidence because it was properly admissible as a prior consistent statement. Smith wanted to call Gilbert, who would testify regarding statements he made to her immediately after the April 13 meeting that were consistent with his testimony in court. Smith's prior consistent statements—made in his conversation with Gilbert—were made before M & I's sale of the stock, and thus prior to any motive that Smith would have had to inaccurately present what happened at the meeting. The testimony would thus rebut one of the allegations implicit in this lawsuit—that Smith authorized the sale of stock at the meeting but later contended that he had not.

The error, however, was harmless. The trial court's findings indicate that even if Gilbert's testimony had been allowed it would not have changed the outcome of the trial. The trial court found the testimony of M & I's three witnesses, who each testified that Smith authorized the sale at the April 13 meeting, but did not discuss prices, to be plausible, consistent, credible, and supported by the documentary evidence. The court found that M & I had nothing to gain by not following Smith's directions because the executive who handled the divestiture was a salaried employee who received no commissions for the sale, and M & I's co-trustee fees would not have been increased by the sale. The trial court found Smith's testimony to be incredible. The trial court found it significant that the stock did close at 26 1/8 on April 15th, two days after the April 13th meeting, and that this was the only date in 1992 to that point at which the stock closed at 26 1/8. The court reasoned that Smith could have known this on April 13th when he claims that he told the three M & I representatives that they were not to sell the stock below 26 1/8. The trial court concluded that Smith's testimony was not perjurious but rather was "the product of his being genuinely confused as to exactly what transpired at the April 13th meeting." In light of the strong evidence supporting M & I's position and the trial court's conclusion that Smith was "genuinely confused," Gilbert's testimony, while lending support to Smith's contention that he believed he would be consulted before the sale of any stock, would not have changed the trial court's conclusion that the M & I witnesses were credible, while Smith's version of the April 13 events was not.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.